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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 BRYCE KELLY,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner of  
Social Security,

15 Defendant.  
16

Case No. 11cv3045 BTM(PCL)

**ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S CROSS-MOTION  
FOR SUMMARY JUDGMENT**

17 Plaintiff and Defendant have filed cross-motions for summary judgment. For the  
18 reasons set forth below, Plaintiff's motion is **DENIED** and Defendant's motion is **GRANTED**.  
19

20 **I. PROCEDURAL BACKGROUND**

21 On July 24, 2007, Plaintiff filed applications for Disability Insurance Benefits ("DIB")  
22 under Title II of the Social Security Act ("Act"), and for Supplemental Security Income ("SSI")  
23 benefits under Title XVI of the Act. (Tr. 220-226.) Plaintiff alleged disability as of March 1,  
24 2003. After a hearing before an Administrative Law Judge ("ALJ") on June 17, 2009, the ALJ  
25 found that Plaintiff was not disabled. (Tr. 99-105.) Plaintiff filed a request for review, which  
26 the Appeals Council granted. (Tr. 109-11.) The Appeals Council remanded Plaintiff's case  
27 for a new hearing and directed the ALJ to obtain any available updated treatment records,  
28 further evaluate Plaintiff's subjective complaints, and provide rationale in accordance with

1 disability regulations pertaining to the evaluation of symptoms, and, if warranted, obtain  
2 supplemental evidence from a vocational expert. (Tr. 110.)

3 On remand, ALJ Peter J. Valentino held a hearing on July 27, 2010. In a decision  
4 dated August 20, 2010, the ALJ found that Plaintiff was not disabled from the alleged onset  
5 date of March 1, 2003, through the date of the decision. (Tr. 13-23.) On August 31, 2011,  
6 the Appeals Council denied Plaintiff's request for review. (Tr. 4-9.) In this action, Plaintiff  
7 seeks judicial review of the final decision of the Commissioner pursuant to 42 U.S.C. §  
8 405(g).

## 9 10 **II. ALJ'S FINDINGS AND CONCLUSIONS**

11 The ALJ found that Plaintiff was insured for disability insurance benefits through  
12 March 31, 2008.

13 The ALJ found that Plaintiff has the following severe impairments: status-post knife  
14 injury to left little finger, mild right carpal tunnel syndrome, degenerative disc disease of the  
15 spine without neurologic deficit, mild osteoarthritis of the knees, and hypertension.

16 The ALJ concluded that Plaintiff's impairment or combination of impairments do not  
17 meet or equal any of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1.

18 The ALJ determined that Plaintiff has the residual functional capacity to perform light  
19 work with the following additional limitations: occasional lifting and carrying of twenty pounds,  
20 frequent lifting and carrying of ten pounds, precluded from climbing ladders, scaffolds, or  
21 ropes, precluded from working at unprotected heights, should not be exposed to  
22 concentrated vibration or hazards, and has a limitation with regard to the left hand to  
23 occasional fingering but frequent reaching and handling and a limitation in regard to the right  
24 hand to frequent handling, reaching, and fingering.

25 Based on the testimony of a vocational expert ("VE"), the ALJ found that Plaintiff could  
26 perform past relevant work as a car lot attendant. The ALJ also found that there are other  
27 jobs existing in the national economy that Plaintiff is able to form, including furniture rental  
28 clerk (DOT No. 295.357-018) and usher (DOT No. 344.677-014).

1 Accordingly, the ALJ concluded that Plaintiff has not been under a “disability” as  
 2 defined in the Social Security Act, at any time from his alleged onset date of March 1, 2003,  
 3 through the date of the ALJ’s decision.<sup>1</sup>

### 4 5 **III. STANDARD OF REVIEW**

6 The Commissioner’s denial of benefits may be set aside if it is based on legal error  
 7 or is not supported by substantial evidence. Jamerson v. Chater, 112 F.3d 1064, 1066 (9th  
 8 Cir. 1997). Substantial evidence is more than a scintilla but less than a preponderance. Id.  
 9 Substantial evidence is “relevant evidence which, considering the record as a whole, a  
 10 reasonable person might accept as adequate to support a conclusion.” Flaten v. Secretary  
 11 of Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995). If the evidence can  
 12 reasonably support either affirmance or reversal, a court may not substitute its judgment for  
 13 that of the Commissioner. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999).

### 14 15 **IV. DISCUSSION**

16 Plaintiff contends that the ALJ’s decision was erroneous because the ALJ improperly  
 17 rejected the opinion of Plaintiff’s treating physician Dr. Boquin, M.D, regarding Plaintiff’s  
 18 functional limitations. As discussed below, the Court finds that the ALJ provided sufficient  
 19 reasons for rejecting Dr. Boquin’s opinion and therefore affirms the ALJ’s decision.

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22 <sup>1</sup> Under the Social Security Regulations, the determination of whether a claimant is  
 23 disabled within the meaning of the Social Security Act is a five step process. The five steps  
 24 are as follows: (1) Is the claimant presently working in any substantially gainful activity? If  
 25 so, then the claimant is not disabled. If not, then the evaluation proceeds to step two. (2) Is  
 26 the claimant’s impairment severe? If not, then the claimant is not disabled. If so, then the  
 27 evaluation proceeds to step three. (3) Does the impairment “meet or equal” one of a list of  
 28 specific impairments set forth in Appendix 1 to Subpart P of Part 404? If so, then the  
 claimant is disabled. If not, then the evaluation proceeds to step four. (4) Is the claimant  
 able to do any work that she has done in the past? If so, then the claimant is not disabled.  
 If not, then the evaluation proceeds to step five. (5) Is the claimant able to do any other  
 work? If not, then the claimant is disabled. If, on the other hand, the Commissioner can  
 establish that there are a significant number of jobs in the national economy that the  
 claimant can do, the claimant is not disabled. 20 C.F.R. § 404.1520. See also Tackett v.  
Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

1           1. Dr. Boquin's Opinion

2           On June 15, 2009, Dr. Boquin, a doctor at Vista Community Clinic, completed a  
3 "Physical Residual Functional Capacity Questionnaire" regarding Plaintiff. (Tr. 489-98.) Dr.  
4 Boquin listed his diagnosis as (1) severe osteoarthritis in Plaintiff's knees, (2) flexion  
5 contraction left fingers, and (3) severe arterial hypertension. (Tr. 494.) Dr. Boquin  
6 concluded that Plaintiff was unable to work through the end of the year. (Id.)

7           Dr. Boquin noted on the form that Plaintiff experiences severe and constant pain that  
8 is worse while walking or bending legs. (Tr. 489.) Dr. Boquin identified the clinical findings  
9 and objective signs as decreased range of motion at the knee joints, increased pain on  
10 passive mobilization and inability to flex left fingers. (Id.)

11          Dr. Boquin found that Plaintiff had a number of functional limitations and could sit for  
12 only 1 hour at time, stand for 30 minutes at a time, sit and stand/walk for a total of less than  
13 2 hours in one day, lift or carry less than 10 pounds occasionally, rarely lift or carry 10  
14 pounds, and rarely twist. (Tr. 490-92.) According to Dr. Boquin, Plaintiff needed to be able  
15 to shift at will and take frequent unscheduled breaks. (Tr. 491.) Dr. Boquin indicated that  
16 Plaintiff's physical condition was affected by anxiety and psychological factors and that  
17 Plaintiff's experience of pain interfered with his attention and concentration constantly. (Tr.  
18 490.)

19          Dr. Boquin noted that Plaintiff had significant limitations with respect to reaching,  
20 handling, and fingering. (Tr. 492.) Dr. Boquin indicated that Plaintiff could reach with his  
21 right arm 70% of a work day, reach with his left arm 5% of the day, and could never use his  
22 left hand for grasping, turning, twisting, or fine manipulation. (Id.)

23  
24          2. Law Governing Treating Physicians' Opinions

25          As a general matter, opinions of treating physicians are given controlling weight when  
26 supported by medically acceptable diagnostic techniques and when not inconsistent with  
27 other substantial evidence in the record. See 20 C.F.R. § 404.1527(d)(2); SSR 96-2p.  
28 Where a treating physician's opinion is contradicted by another doctor, the ALJ may not

1 reject the treating physician's opinion without providing "specific and legitimate reasons"  
 2 supported by substantial evidence in the record. Reddick v. Chater, 157 F.3d 715, 725 (9th  
 3 Cir. 1990). In doing so, the ALJ must do more than proffer his own conclusions – he must  
 4 set forth his own interpretations and why they are superior to that of the treating physician's.  
 5 Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988). The ALJ may meet this burden by  
 6 conducting a detailed and thorough discussion of the facts and conflicting evidence, and by  
 7 explaining his interpretations and findings. Magallanes v. Bowen, 881 F.2d 747, 751 (9th  
 8 Cir. 1989).

9 Even if the treating physician's opinion is inconsistent with other substantial evidence  
 10 in the record, the treating physician's opinions are still entitled to deference and must be  
 11 weighted using the factors provided in 20 C.F.R. § 404.1527. Holohan v. Massanari, 246  
 12 F.3d 1195, 1202 (9th Cir. 2001); SSR 96-2p. These factors include, inter alia, the "nature  
 13 and extent of the treatment relationship" between the patient and the treating physician, the  
 14 "length of the treatment relationship and the frequency of examination," the amount of  
 15 relevant evidence that supports the opinion and the quality of the explanation provided, and  
 16 the consistency of the medical opinion with the record as a whole. 20 C.F.R. §  
 17 404.1527(d)(2)-(6).

### 18 19 3. ALJ's Specific and Legitimate Reasons

20 The ALJ afforded considerable weight to the opinion of Dr. Lorber, an orthopedic  
 21 surgeon who reviewed Plaintiff's medical records and testified as a medical expert at the  
 22 hearing before the ALJ. Dr. Lorber opined that Plaintiff has a severe impairment involving  
 23 his lumbar spine and thoracic spine and has an impairment involving his left hand.<sup>2</sup> (Tr. 81.)  
 24 Dr. Lorber concluded that Plaintiff was reduced to a light level of work, involving occasional

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 26 <sup>2</sup> As noted by Dr. Lorber, X-rays taken on November 2, 1998, showed an old  
 27 compression fracture of T12 with spurring anteriorly at the anterior and inferior aspect of T12  
 28 and anterior aspect of L1, and ossification anterior to C1 as well as diminution of the C1 and  
 C2 interspace. (Tr. 370.) A February 9, 2000 MRI revealed central canal stenosis  
 secondary to congenitally short pedicles at L4-L5. (Tr. 370-71.) X-rays of Plaintiff's cervical  
 spine taken in February 2008, revealed degenerative changes at the C5-6 level with  
 straightening. (Tr. 417.)

1 lifting of up to 20 pounds, occasional bending, stooping, crouching, and kneeling, and no  
 2 restrictions on standing or walking. (Id.)<sup>3</sup> Dr. Lorber stated that Plaintiff may have some  
 3 minimal restrictions of fingering involving the left hand but no other exertional, environmental,  
 4 or manipulative restrictions. (Id.)

5 The ALJ afforded “less weight” to the opinions of non-examining medical consultants  
 6 Drs. Gleason and Lizarraras, who assessed limitations consistent with the performance of  
 7 light work activity with a limitation to frequent reaching and fingering. (Tr. 350-56; 420-21.)  
 8 The ALJ afforded “little weight” to the opinion of Dr. Boquin. (Tr. 21.)

9 Plaintiff contends that the ALJ failed to provide specific and legitimate reasons for  
 10 rejecting Dr. Boquin’s opinion, including his opinion regarding Plaintiff’s limitations with  
 11 respect to reaching at or above shoulder level. The Court disagrees.

12 The ALJ reasoned that Dr. Boquin had failed to include any specific medical findings  
 13 to support restricting sitting, standing, or walking to less than two hours in an eight-hour day,  
 14 and appeared to rely on Plaintiff’s subjective complaints, which the ALJ found not to be  
 15 credible. (Tr. 20.) Dr. Boquin’s clinical findings were limited to observation of a decreased  
 16 range of motion of the knee joints, an increase of pain on passive mobilization, and an  
 17 inability to flex the left little finger and extend the left fingers. (Tr. 489, 550.) Although Dr.  
 18 Boquin noted on the Questionnaire that the frequency and length of contact with Plaintiff was  
 19 two months, the record does not include any documents showing that Plaintiff saw Dr.  
 20 Boquin before June 15, 2009.<sup>4</sup> Plaintiff saw another doctor at Vista Community Clinic on  
 21 June 3, 2009. (Tr. 551.) That doctor noted that Plaintiff had decreased hand movement due  
 22 to a stabbing, was unable to bend his knee past a certain point (<70 degrees), and had  
 23 some ACL/MCL pain although there was no redness, warmth, or swelling. (Id.) The limited

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 26 <sup>3</sup> Dr. Lorber explained that Plaintiff underwent arthroscopy on his knee in 1993 and  
 27 was diagnosed with osteoarthritis in 2009 after complaining of bilateral knee pain, but has  
 not received further evaluation or treatment of his knee. (Tr. 79, 461, 550.)

28 <sup>4</sup> Plaintiff went to the Vista Community Clinic a few times in January-February 2008.  
 (Tr. 407-411.) It appears that Plaintiff missed an appointment with Dr. Boquin on February  
 11, 2008. (Tr. 407.)

1 medical findings by Dr. Boquin and the other Vista Community Clinic doctor do not support  
 2 the severe limitations indicated by Dr. Boquin, particularly the limitations regarding sitting,  
 3 standing, and reaching.

4 Due to the lack of clinical evidence, it seems that Dr. Boquin must have been relying  
 5 in large part on Plaintiff's pain and symptom testimony in filling out the Questionnaire. The  
 6 ALJ determined that Plaintiff's pain and symptom testimony was not credible. (Tr. 20.)<sup>5</sup>  
 7 Plaintiff does not challenge the ALJ's credibility finding. Accordingly, the Court concludes  
 8 that it was not error for the ALJ to reject Dr. Boquin's opinion on the ground that it was  
 9 primarily based on Plaintiff's subjective complaints, which are not fully credible. See Bayliss  
 10 v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005) (holding that substantial evidence  
 11 supported the ALJ's decision not to rely on doctors' opinions, which were based on  
 12 claimant's subjective complaints, where claimant was found not to be credible).

13 The ALJ also pointed out that Dr. Boquin's assessment appeared to be overreaching  
 14 with respect to the level of restriction, as shown by Dr. Boquin's opinion that Plaintiff was  
 15 completely unable to use his left hand for grasping, turning or fine manipulation. (Tr. 21.)  
 16 Plaintiff claimed that he had surgery on his left hand in 1993 and that all of the tendons were  
 17 cut in his fingers, preventing him from bending his fingers properly. (Tr. 58. 75.) However,  
 18 Plaintiff admitted that he was able to use his left hand to work from 1993 to 2003, including  
 19 his job at San Diego Auto Auction, a position which the vocational expert testified best  
 20 classifies as a "lot attendant," which involves frequent reaching and handling and occasional  
 21 fingering. (Tr. 55, 75, 85-86.)<sup>6</sup>

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22  
 23 <sup>5</sup> The ALJ found that Plaintiff was not credible because his daily activities belie his  
 24 allegations of impairment, his treatment has been conservative, no significant neurological  
 25 deficits were found on examination, there has been no end-organ damage despite poorly  
 controlled hypertension, there is no documentation of debilitating side effects from  
 medication, and Plaintiff lacked candor with his medical provider concerning the nature and  
 extent of his drug use. (Tr. 20.)

26 <sup>6</sup> The ALJ also gave as a reason for rejecting Dr. Boquin's opinion that the opinion  
 27 "is overreaching in time in that he indicates the description of symptoms and limitations  
 28 spans the claimant's entire lifetime." (Tr. 21.) In response to the question, "What is the  
 earliest date that the description of symptoms and limitations in this questionnaire applies?,"  
 Dr. Boquin wrote "Lifetime." (Tr. 493.) It appears that Dr. Boquin misread the question and  
 believed that it asked how long Plaintiff's symptoms and limitations will last.



1 Another reason the ALJ gave for giving little weight to Dr. Boquin's opinion is that  
2 there is a variance between the doctor's assessment and the Plaintiff's self-reported daily  
3 activities. The Court agrees that Plaintiff's daily activities seem inconsistent with, at the very  
4 least, Dr. Boquin's opinion that Plaintiff could not use his left hand at all and could only reach  
5 with his left arm for 5% of a work day. At the first ALJ hearing on June 17, 2009, Plaintiff  
6 stated that he didn't drive anymore because his left hand stiffens up. (Tr. 43.) However, at  
7 the July 27, 2010 hearing, Plaintiff testified that he takes care of his disabled girlfriend, works  
8 around the house, drives her to her appointments, picks up and drops off her children at  
9 school, and tries to clean up the yard. (Tr. 64-65.)

10 In sum, the ALJ provided "specific and legitimate reasons" supported by substantial  
11 evidence in the record for affording little weight to Dr. Boquin's opinion. Therefore, the Court  
12 affirms the ALJ's decision.

#### 13 14 **V. CONCLUSION**

15 For the reasons discussed above, Plaintiff's motion for summary judgment is **DENIED**  
16 and Defendant's motion for summary judgment is **GRANTED**. The Clerk shall enter  
17 judgment for Defendant affirming the decision of the Commissioner.

18 **IT IS SO ORDERED.**

19 **DATED: March 29, 2013**

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21 **BARRY TED MOSKOWITZ** Chief Judge  
22 United States District Court  
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